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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 566

RUSSELL GLENWOOD FULTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 183–185;[1] Pet. App. 1a–3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1961 (R. 182; Pet. App. 3a). The petition for a writ of certiorari was filed on November 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the appendix to appellant's brief in the court below.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the conviction for the use of interstate telephone wires in furtherance of a scheme to defraud.

2. Whether the trial court's ruling as to the evidence to be considered amounted to a direction to the jury to convict.

STATEMENT

A three-count indictment returned in the United States District Court for the Northern District of Ohio charged petitioner and one Fred Green with use of interstate telephone wires in execution of a scheme to defraud, in violation of 18 U.S.C. 1343 (R. 5–7).[1] Following a jury trial, petitioner and Green were found guilty as charged. On September 23, 1960, petitioner was sentenced to five years imprisonment (R. 13–14). On appeal, the convictions were unanimously affirmed as to each defendant.[2]

The pertinent facts may be summarized as follows:

1. On July 1, 1960, at a meeting with Mrs. Bessie Fall of Holland, Ohio, Green, who called himself "Fred Cook", said that he worked for the "Harrison-Fisher Company", which was the "largest book" in the United States; that he knew when trainers and horses; that he would pass that information on to

[1] Co-defendant Green was charged in counts 1 and 3 with having used or having caused the use of interstate telephone wires on two dates for the purpose of furthering the scheme to defraud.

[2] Green has not joined in the petition for a writ of certiorari.

owners of horses were going to place bets upon her; and that she "was to give him half of the profit[s]" (R. 27–30, 32, 99–100). He further stated that he would try to arrange a $5,000 "credit" for Mrs. Fall's account; that he would telephone her each day from Chicago and give her the horses on which she should place bets; and that she should telephone the "Harrison-Fisher Company" at MIdway 3–3275 in Chicago in order to place bets (R. 31–32). Green, under the name of Peters, had rented an apartment in Chicago which contained a telephone with the Midway number given to Mrs. Fall (R. 15–23, 120).

Mrs. Fall agreed to the plan. On the following day, Green telephoned Mrs. Fall and said that the arrangements had been made, *i.e.*, that her account was credited with $5,000, and that she should identify herself as "BF–5" when she placed her bets (R. 32–33, 71–72). From July 2 to July 13, telephone calls were made from MIdway 3–3275 to the residence of Mrs. Fall, and Mrs. Fall placed bets on horses by telephoning the Midway number in Chicago (R. 34–36, 71–72, 74–75, 114–115, 125). On July 13, Mrs. Fall had "winnings" of about $58,000, less the $5,000 "credit" (R. 36–37).

On July 14, Green met Mrs. Fall in Ohio and said that he needed $5,000 to cover the "credit" for her account; that he would be able to put up $3,500 of that amount; and that Mrs. Fall should put up the balance of $1,500 (R. 37). She agreed, and, shortly thereafter, paid $1,500 to Green. At about that time,

Green instructed Mrs. Fall to telephone Chicago and inform a "Mr. Michaels" that she wanted to withdraw $55,000 from her account (R. 40). He told her not to place that call "until he had time to get back to Chicago again" (R. 40). Mrs. Fall subsequently placed a telephone call to the Midway number in Chicago and left word for "Mr. Michaels" to call her (R. 41, 42). At about 5:00 p.m. that day (July 14), a "Mr. Michaels" telephoned Mrs. Fall (R. 42–43, 45–46). When apprised by Mrs. Fall that she wanted to withdraw $55,000 from her account, he said that her profit balance was about $63,000, and that he would "come down" and deliver $55,000 to her on the following day (R. 43–47). This was the only telephone call which Mrs. Fall received from Chicago or from either "Mr. Michaels" or Green on July 14th (R. 45–46). The records from telephone companies in Ohio and Illinois indicated that a long-distance telephone call was placed from Mrs. Fall's telephone to the Midway number in Chicago on July 14, and that, at about 11:00 p.m. on July 14, a telephone call from the Midway number in Chicago was placed to Mrs. Fall's residence (R. 115, 119–120, 125). This was the only telephone call which the telephone records indicated was made from the Midway number to Mrs. Fall's residence on July 14, 1960 (R. 115, 119–120).

At about noon on July 15, petitioner met Mrs. Fall at her residence in Holland, Ohio, and said that he was "Mr. Michaels" (R. 44–45). Mrs. Fall testified that the voice was the same as that of the one calling himself Mr. Michaels in the telephone conversation the day before (R. 107). Petitioner was carrying a black

case, and said that he had the money with him (R. 44–45, 50, 67–68). He said that his "boss" had told him that there were some "discrepancies" in the "playing", and that before he could give her the money, she would have to "show" $9,000 to the petitioner (R. 44). Petitioner said that "they paid in cash and they wanted to see cash" (R. 47). Mrs. Fall did not have $9,000, and the petitioner subsequently left her residence. Later that day, Green telephoned Mrs. Fall and said that she should try to raise the money and that he would try to raise some of the money (R. 47).

On July 20, Green met Mrs. Fall and said that his "boss" had sent him to protect "Mr. Michaels" who had the money, and that the "company" would not wait any longer for the $9,000 (R. 50). Mrs. Fall said that she could obtain $7,000 at a bank on the following day. Green said that he could raise the $2,000 balance. The two agreed to meet in front of the bank the next day (R. 53–54).

On July 21, Green was arrested by agents of the Federal Bureau of Investigation as he was conversing with Mrs. Fall in front of a bank (R. 141–142). Shortly thereafter, petitioner was arrested (R. 150–151).

2. During the early part of the trial, when no evidence had been introduced concerning petitioner, the trial court sustained objections on behalf of petitioner that the testimony was not to be considered as relating to petitioner. The court also instructed the jury on several occasions that they were not to consider the evidence at that time as being connected with

petitioner (see, *e.g.*, R. 28, 31). At the conclusion of the testimony of Mrs. Fall, the following colloquies transpired (R. 109–110):

> Mr. COLASURD [Assistant United States Attorney]. Your Honor, there were various objections by Mr. Rotenberg on much of the testimony previously offered on the basis of the fact that Mr. Fulton was not present nor was there any proof of a scheme to defraud. I think the Government has now sufficiently proved that and I would like to have the jury instructed that they can hear all that testimony with reference to both men.
>
> The COURT. That is true. The jury may consider the testimony insofar as it has been offered at this time as going to both of the defendants.
>
> Mr. ROTENBERG [counsel for petitioner]. Your Honor, we object to that inasmuch as it was not admitted with the reservation that later it might be tied up. I believe at the time it was merely stricken as to Mr. Fulton. Therefore, I don't see how at this time it can be admitted.
>
> The COURT. On the ground that there is no proof of a scheme to defraud.
>
> Mr. ROTENBERG. I didn't hear your Honor say that it was being stricken subject to the proving of that scheme, and of course we do not believe that such a scheme has as yet been proven.
>
> The COURT. You have the testimony of the witness here that the Court deems is sufficient so far as the requirements are concerned for linking the two defendants. That may stand.

In its instructions, the court pointed out that petitioner was charged only in count 2 (R. 164) and that (R. 165):

> In proving the guilt of the Defendant Russell Glenwood Fulton, the Government must establish beyond a reasonable doubt that the defendant did devise a scheme to defraud Bessie M. Fall and to obtain her money by means of false and fraudulent pretenses and promises which defendant knew to be false when made in manner as charged and that on or about July 14th for the purpose of executing such scheme he did transmit or did cause to be transmitted sounds by means of wire, to-wit: by telephone from Chicago, Illinois, to Holland, Ohio, as charged in the Indictment.

The court also charged (R. 167) that "[i]f one's intent is to defraud when he joins a dishonest scheme, he becomes a part of the scheme, although he may know nothing but his own share in the aggregate wrongdoing."

ARGUMENT

1. (*a*) There is no merit to petitioner's contention (Pet. 16–17) that the evidence was insufficient to support petitioner's conviction. The evidence is uncontradicted that Mrs. Fall received a telephone call from the petitioner on July 14, 1960, and there is no question but that the call was made in furtherance of the scheme to defraud (see the Statement, *supra*, p. 4).

(*b*) The remaining issue—whether the telephone call was an interstate one—is also not open to serious question. Mrs. Fall testified that the telephone call

which she received from "Mr. Michaels", whom she subsequently identified as the petitioner, was the only telephone call which she received from Chicago on July 14th (R. 45–46, 107). She said that Green did not telephone her because she had met with him in Ohio earlier that day (R. 46). The records of the Illinois Bell Telephone Company indicated that at about 11:00 p.m., on July 14, 1960, a telephone call was placed from the Midway number in Chicago to Mrs. Fall's telephone number in Ohio. The fact that the telephone records indicated that the call in question was placed at about 11:00 p.m., whereas Mrs. Fall testified that the call was received at about 5:00 p.m., was not such a discrepancy as would bar the jury from concluding that the call from "Mr. Michaels" came from Chicago.

Moreover, the circumstances surrounding the receipt of the telephone call in question indicated that the call came from Chicago. Green not only instructed Mrs. Fall on July 14 to telephone Chicago and inform "Mr. Michaels" that she wanted to withdraw $55,000 from her account, but, significantly, he told her not to place that call "until he had time to get back to Chicago again" (R. 40). His statement could reasonably be construed to mean that Green wanted to see the petitioner in Chicago prior to Mrs. Fall's telephone call there. Furthermore, Mrs. Fall placed a telephone call to Chicago on July 14 and left word for "Mr. Michaels" to call her back (in Ohio). When the petitioner returned the call later that day, he said in effect that he would "come down" (to Ohio) on the

following day and deliver the money to her (R. 43–47). Thus, the sum total of the evidence, both direct and circumstantial, justifies the conclusion that the petitioner used or caused the use of interstate telephone wires in furtherance of the scheme to defraud.

2. (*a*) Petitioner contends (Pet. 8–10, 15–16) that the trial court's instruction to the jury at the conclusion of Mrs. Fall's testimony that the jury could consider her testimony as relating to petitioner amounted to an instruction that the government had proved the existence of a fraudulent scheme. None of the court's instructions to the jury during the trial had such an effect or intendment. Mrs. Fall's testimony showed that petitioner had a connection with the scheme. The testimony was therefore properly admissible as against both defendants. At a trial of coconspirators, the trial judge has discretion to decide whether he will originally admit evidence as to all defendants, subject to having it stricken or limited in its effect if it does not connect all the defendants with the conspiracy, or will admit the evidence originally only as to the one to whom it directly relates, subject to having it apply to all the defendants if there is prima facie evidence that the others are members of the conspiracy. See *Hoeppel* v. *United States*, 85 F. 2d 237, 242 (C.A. D.C.), certiorari denied, 299 U.S. 557; 4 Wigmore, *Evidence*, Sec. 1079 (3d ed.), and 1959 Supplement, p. 67; 6 *id.*, Secs. 1870, 1871.

The trial court followed the latter course. The ruling at the conclusion of Mrs. Fall's testimony was

only an instruction to the jury that it could consider her testimony in relation to petitioner. The instruction did not remove from the case the issue whether the government had proved a scheme to defraud, for the court explicitly went on to point out that one of the elements of the offense was the existence of a scheme to defraud, that each of the elements had to be proved beyond a reasonable doubt before a finding of guilt could be made, and that, in determining the question of guilt as regards petitioner, he must be shown to have, *inter alia,* "devise[d] a scheme to defraud" (R. 165; see the Statement, *supra,* p. 7).

(*b*) Petitioner further contends (Pet. 11–15) that the trial court erred in failing to instruct the jury that a "common design or common concert of action" with Green was required before the testimony of Mrs. Fall could be admissible as to the petitioner. But the court did charge that a scheme to defraud which "is shared in by two or more men * * * becomes a conspiracy and is treated in law as such"; that, once a scheme to defraud has been devised, "another [person] may come into that scheme, may join it at any time during the perpetration, or attempted perpetration, or execution of the scheme"; and that no "formal agreement" is necessary to the establishment of a scheme to defraud, "it being sufficient if there is association and purpose to defraud" (R. 167–168). Thus the whole intendment of the charge as regards the scheme indicated that, before the jury could consider Mrs. Fall's testimony as relating to petitioner, it

had to find that the petitioner and Green acted in concert.[*]

Although petitioner relies (see Pet. 9–13) upon *United States* v. *Pronger*, 287 F. 2d 498 (C.A. 7), and *Schmeller* v. *United States*, 143 F. 2d 544 (C.A. 6), the present case differs from those cases in the nature of the proof and in the charge actually given. Petitioner was indicted only for his own use of the interstate wire. Unlike the defendants in *Pronger* and *Schmeller*, he was not charged with responsibility for acts performed by others in the furtherance of the scheme to defraud. The testimony relating to Green served largely as background with respect to petitioner. Under the instructions, the jury could not have found petitioner guilty without finding that he himself had made the call with which he was charged.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1961.

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[*] Moreover, since petitioner did not make this objection before the trial court, in accordance with Rule 30, F.R. Crim. P. (see R. 173–175), he is in no position to challenge the instructions on this ground.

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